Nos. 332 and 333

Supreme Court of the United States

OCTOBER TERM, 1953

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL., *Appellants*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

On Appeal From the United States District Court for the District of Colorado

BRIEF OF APPELLEE IN OPPOSITION TO MOTION TO REVERSE

FRANK E. HOLMAN
1006 Hoge Building
Seattle 4, Washington

DENNIS MCCARTHY
Walker Bank Building
Salt Lake City 1, Utah

ROBERT E. QUIRK
1116 Investment Building
Washington 5, D. C.
Attorneys for Appellee

September 15, 1953

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CASES CITED

Page

Supreme Court of the United States

OCTOBER TERM, 1955

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL., *Appellants,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

On Appeal From the United States District Court for the District of Colorado

---

BRIEF OF APPELLEE IN OPPOSITION TO MOTION TO REVERSE

This brief is filed for appellee, The Denver and Rio Grande Western Railroad Company, herein called the Rio Grande, in opposition to the Motion To Reverse the judgment of the court below recently filed by the appellants in No. 332, Washington Public Service

Commission, et al., and the appellants in No. 333, the Union Pacific Railroad Company, et al.

For the reasons hereinafter stated, the Motion To Reverse should be denied.

PREFATORY STATEMENT

The decision and judgment of the court below is reported as *Denver & Rio Grande Western R. Co.* v. *United States,* 131 F. Supp. 372. In that decision the court dealt with the validity of the order of the Interstate Commerce Commission involved in *Denver & Rio Grande* v. *Union Pacific Railroad, et al.,* 287 I.C.C. 611. The court held that the Rio Grande had standing to maintain the suit and that the order of the Commission insofar as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with its opinion. The court decided, *inter alia,* that on the undisputed evidence before the Commission and by reason of the admissions of counsel and the principal traffic witness of the Union Pacific it erred in refusing to find that through routes existed in connection with the Rio Grande and the Union Pacific via Ogden, Utah, on the traffic and between the originating and destination territories involved.

The gist of the Denver decision is represented by the following pertinent paragraph from the that decision:

> "The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to

have the Commisison apply the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act, free of any of the limitations imposed by Section 15(4) with respect to the establishing of through routes."

The Interstate Commerce Act, viewed as a whole, and without reference to any particular provision was clearly designed to assure, so far as possible, to the country as a whole and to all parts thereof a national and coordinated system of transportation, and not to permit any particular railroad to close off any section or area, and claim a monopoly with respect thereto as to the free flow of traffic to and from the area.

The "closed door" territory in Northern Utah, Idaho, Montana and Washington is one of the largest areas in the United States which a particular railroad claims as its own principality and asserts the right to control the traffic in and from that area, or as a matter of whim or otherwise to prefer certain railroad connections and to discriminate against the Rio Grande so as to exclude that area on traffic moving to and from that area via the Rio Grande. As to freight traffic moving to and from that area, the Union Pacific with the aid of its connections claims the right to say to the public, you may ship over its lines to and from Colorado common points or to and from points east and southeast of the Colorado common points at joint competitive through rates, or you may ship at joint through rates via routes which are longer than the route of the Union Pacific and its preferred connections than the distance via the route of the Rio Grande through Ogden, to wit: To and from Seattle, Wash., to and from Colorado common points or points east thereof via the Southern Pacific at Portland to Ogden, and the Union Pacific or the Rio Grande from Ogden

to Denver, or via the Southern Pacific at Portland through Southern California, Arizona and New Mexico to Kansas City, St. Louis, New Orleans, Chicago or other points. The Union Pacific also maintains joint rates and through routes from points in eastern Washington and Oregon in connection with the Great Northern, the Northern Pacific and the Milwaukee to Minneapolis, Chicago, New York, Cleveland, St. Louis and all points in the east in which it accepts less than 250 mile hauls as against its long haul to Omaha and Kansas City or as against the haul of over 800 miles it would get if the traffic moved via the Union Pacific and the Rio Grande via Ogden.

In the closed door area the Union Pacific has a practical monopoly and it asserts the right, free from any authority of the Interstate Commerce Commission or of the courts, to grant or withhold to other railroads favors as to rates and interchange practices as it sees fit. This is contrary to the provisions and the policy underlying the Interstate Commerce Act which require railroads to act together so as to constitute one national coordinated system of transportation, of which the Rio Grande is as much a part as any other railroad.

The appellee herein, The Denver and Rio Grande Western Railroad Company, instituted proceedings before the Interstate Commerce Commission (which are the proceedings on review here) to challenge the right of the Union Pacific Railroad to maintain such a transportation monopoly.

The Complaint before the Interstate Commerce Commission was filed August 1, 1949. It directly challenged the monopoly and overlordship exercised by the Union Pacific over the business and economic life of

a territory equal in size to twice the area of New England, New York, Pennsylvania and Maryland. A number of interested shippers and organizations and public service commissions intervened. After the taking of voluminous testimony the Interstate Commerce Commission Examiner, Mr. Frank Mullen, rendered a Report according to the Rio Grande and the shippers involved substantially the relief prayed for. Numerous exceptions to the Examiner's Report were filed, followed by voluminous briefs by the parties directly involved (the Rio Grande and Union Pacific), and by various intervenors on each side.

On January 12, 1953, the Commission made its Report and Order—the Order specifically making the Report "a part of the Order", by reciting in the Order that the "report is hereby referred to and made a part hereof". This Report and Order accorded relief to the Rio Grande and to the shippers involved with respect to certain named commodities and denied relief with respect to all other commodities to and from the Union Pacific's "closed door territory". Among the ten commissioners who participated in the Interstate Commerce Commission decision (one, Commissioner Knudsen, having disqualified himself), there was a wide difference of opinion, and several varying separate written opinions filed. Although there was a concurrence of six on the measure of relief granted as to the named commodities, there was a tie vote of five to five on what was alleged in the complaint and treated by all of the Commissioners as the basic issue of the case, namely, whether as claimed by the Rio Grande *through routes* were in existence so as to entitle the Rio Grande to relief apart from Section 15(4) of the Act which imposes limitations on the Commis-

sion with respect to the establishment of *through routes* when none exist.

The Report which is made a part of the Order shows on its face that only four of the ten voting members actually approved and adopted the Report and Order purportedly made "By the Commission". A reference to the Report (287 I.C.C. 611) shows:

(1) that Commissioner Patterson *concurred in part*, but thought the report inconsistent in failing to grant relief on lumber;

(2) that Commissioner Arpaia *concurred*, but *thought that through routes existed*, but would limit the competitive joint rates to the commodities as granted in the "master" report;

(3) that Commissioner Lee *concurred in part*, but *thought that through routes existed*, and would extend the relief;

(4) that Commissioner Mahaffie (with whom Commissioners Splawn and Cross joined) *dissented in part*, but *thought that through routes existed*, and would extend the relief.

Whatever is otherwise said of what the "Commission Decided" or did not decide, it is clear that there was no decision by a majority of the Commission on the first and foremost question of the existence of *through routes*, and that the failure of the Commission to decide this question colored and distorted its whole approach to the case.

The Denver court held that under the undisputed evidence before the Commission and by reason of the admissions of counsel and the chief traffic witness of the Union Pacific, that as a matter of law *through routes* existed, and that the Commission in considering the

matter erred in imposing upon itself the necessity of proceeding under the stringent limitations of Section 15(4). The Denver court also remanded the case to the Commission for further proceedings in accordance with the law as determined by that court with respect to the existence of *through routes*.

BACKGROUND OF CASE

Before dealing directly with the points relied upon by the appellants it is deemed appropriate briefly to describe the Rio Grande and the issues before the Commission and before the court below. The Rio Grande is a common carrier by railroad engaged in transportation of persons and property in intrastate, interstate and foreign commerce. It operates 2400 miles of railroad in Colorado, New Mexico and Utah. It has interchange track connections and interchanges traffic with the Union Pacific Railroad at Denver and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, Utah, and the Western Pacific at Salt Lake City. It also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado and Southern and the Missouri Pacific Railroad; at Walsenburg, Colo., with the Colorado and Southern and at Trinidad, Colo., with the Santa Fe and the Colorado and Southern.

The Rio Grande filed its complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroads. The complaint alleged, *inter alia*, that the failure and refusal of the defendant railroads to establish joint competitive through rates and competitive through routes via

Ogden, Utah, and the Rio Grande on interstate and foreign freight traffic, in carloads, and in other quantities, resulted in through rates which are excessive, unjust, unreasonable and discriminatory in violation of Section 1, Section 3 and Section 15 of the Interstate Commerce Act and that such action is contrary to the national transportation policy since it deprives the public, shippers, and the Rio Grande of the use of available and reasonable through rates and rail facilities at just, reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest.

Plaintiff requested the Commission to enter an order requiring the Union Pacific Railroad Company and other railroad defendants to establish and maintain for the future just, reasonable, and non-discriminatory competitive joint rates and through routes on freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific Railroad Company and its connections in Utah north of Ogden, Utah, and in Idaho, Montana, Oregon, Washington and British Columbia, herein called the closed door area, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colo., and points east thereof; and between Utah common points and the closed door territory served by the Union Pacific railroad and its connections already described.

The complaint also alleged that the through rates and charges applicable to such traffic between the points described via such through routes were and are based upon the combination of the intermediate, local or other rates which rates and charges in the aggregate were and are substantially higher than the

joint through rates maintained by defendant railroads on similar freight traffic between the same origin and destination places and territories which moves via the Union Pacific and the other defendant railroads; that the combination rates applicable on the traffic and between the territories described via said through routes of the Rio Grande and defendant railroads were and are unjust, unreasonable, and discriminatory and unduly prejudicial as compared with the competitive joint rates maintained by the Union Pacific railroad or via the Union Pacific and other defendant railroads on like freight traffic via other competitive routes.

At Ogden, Utah, looking west, the Union Pacific has two diverging lines of railroad which are in the shape of a large "Y". One line extends in a southwesterly direction through Salt Lake City and Provo, Utah, and Las Vegas, Nev., to Los Angeles, Calif. Between points on that line and Colorado common points and points east thereof, the Union Pacific maintains competitive joint through rates and through routes on all freight traffic in connection with the Rio Grande via Salt Lake City and Ogden. The other line of the Union Pacific extends in a northwesterly direction from Ogden through Utah, Idaho, Oregon, Washington and Montana. This is the closed door territory to and from which the Union Pacific and its connections refuse to maintain competitive joint rates on freight traffic via the routes of the Rio Grande through Ogden or Salt Lake City, except on sheep and goats from that territory to certain points and on lumber to Canon City, Colo.

Competitive joint rates and through routes were established in connection with the Rio Grande via

Ogden and Salt Lake City on the traffic and between the territories involved in 1897 by the Oregon Short Line Railroad Company and the Oregon Railroad and Navigation Company at a time when these two companies and the Union Pacific were in separate receiverships. The through routes thus established are still in effect since they have not been canceled by the Union Pacific or by any of its connecting railroads. By August 1906 the Union Pacific had reacquired control over the Oregon Short Line and the Oregon Railroad and Navigation Company, and between August 1906 and December 1915 it caused the joint rates for application via the Rio Grande to be canceled; but no action was taken then or later by the Union Pacific or the other interested railroads to cancel the through routes.

At page 1160 of the transcript of the hearing before the Commission at Boise, Ida., A. J. Stilling, the principal traffic witness of the Union Pacific, unequivocally stated that the through route via the Ogden gateway and the Rio Grande is open and available to shippers who are willing to pay through rates based on the aggregate of the intermediate local rates of the various carriers in the route. Stilling stated that—

> "The Interstate Commerce Act gives all shippers the right to specify the lines over which their shipments shall move so the Ogden gateway and route via the Rio Grande is actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington."

Counsel for the Union Pacific made a like admission at pages 2368 and 2369 of the transcript of the oral argument before the Commission on October 16, 1952,

as the result of a colloquy between himself and Chairman Alldredge on the question whether the tariffs which canceled the joint rates in 1906-1915 closed the route via the Rio Grande through Ogden. That colloquy ended as follows:

> "Chairman Alldredge: Do you think that closes this route for this traffic?
>
> "Mr. Collins: No, I don't think so, if they want to pay more, if they want to route via the Rio Grande and pay the price."

As is shown by Appendix 2 attached to this brief, the Commission granted the relief sought by the Rio Grande on nine commodities. The suit in the court below was filed by the Rio Grande upon the grounds that the refusal of the Commission to grant all of the relief sought was arbitrary and capricious, contrary to the statutes, and contrary to the evidence.

Although in the Statements As To Jurisdiction recently filed with the Court by the appellants they insist that the questions presented by their appeals are substantial and of general public importance and that a decision by this court is essential, their Motion To Reverse in practical effect repudiates the points they made in their Jurisdictional Statements. The Motion To Reverse is not only premature, but is not authorized by the Revised Rules of Practice of this court. The citations recited on page 2 of the Motion do not support the right of the appellants to file it. Moreover, in each instance where the case reached this court on appeal the action of the court *affirmed* the judgment *per curiam* on motions to affirm and in no such case cited did this court reverse the judgment of the court below. The other cases cited by the appellants

reached the court on petitions of *certiorari*. In the certiorari cases cited the court granted the petitions for certiorari and reversed the judgments. The appellants cited no decision of this court that reached the court on a statutory appeal which reversed the judgment below after Jurisdictional Statements were filed and before probable jurisdiction was noted.

Footnote 1, page 2 of movants' "Motion to Reverse" should be mentioned in passing. Although it is true that appellants in No. 334, United States of America and Interstate Commerce Commission, seek in their appeal to reverse the same judgment of the district court, the United States of America and the Interstate Commerce Commission have not filed any "Motion to Reverse" and do not join in the "Motion to Reverse" here under consideration, but the United States of America and the Interstate Commerce Commission set forth in their "Jurisdictional Statement" that this appeal involves substantial questions which need full hearing and clarification and settlement.

ERRORS OF STATEMENT AND OF RELEVANCY

An obvious effort has been made in the "Motion to Reverse" to confuse the real issues in the litigation. Only one or two of these will be referred to, but they should be negated because they have been repeated in the "Statement as to Jurisdiction" also filed by the Union Pacific.

It is represented at page 3 of the "Motion to Reverse" that the Rio Grande admittedly filed its complaint for the purpose of improving its financial condition. This is both an error of statement and an error of relevancy. No carrier ever filing a complaint before the Commission would be justified in the eyes of its

stockholders, and even of the public, if it did not in some manner have the objective of improving its financial condition. But the right to file such a complaint is not based upon pecuniary gain. It is filed in order to vidicate a statutory right. There was nothing alleged in the complaint with respect to improving the Rio Grande's financial condition.

There is appended to the "Jurisdictional Statement" of the Union Pacific, and reference is made to it in the "Motion to Reverse", a map which undertakes to represent that the distances to all points east and south of Colorado common points are longer if the traffic is routed over the Rio Grande than if routed over the Union Pacific. This map is based on routings purposely selected as favorable to the Union Pacific. Other maps and charts introduced into the record show situations favorable to the Rio Grande. It would seem unfair on a motion of this kind to leave the Court with the impression that this particular map represents the full and complete facts with respect to comparative distances. Presentation of matters of this character should await a full hearing of the case.

On page 9 of the "Motion to Reverse" figures are set forth as to what the Union Pacific might lose in case the Rio Grande were granted relief in accordance with the prayer of its complaint before the Interstate Commerce Commission, and what it might lose, if the Rio Grande were granted the lesser relief which the Commission accorded. These figures are not conceded by the Rio Grande. They are theoretical and self-serving and not properly a part of a "Motion to Reverse". Many other argumentative conclusions are set forth in the Motion. They can only be properly considered and tested upon a full hearing of the appeal.

It is asserted that the Rio Grande admittedly has no right to the traffic is is seeking. This is an error of relevancy. No carrier has a right to traffic. It is the shipper and not the carrier who determines how the traffic shall be carried. If the Rio Grande has no right to the traffic, neither has the Union Pacific, because as is disclosed by the evidence there are shippers in the area and elsewhere who even in the face of the higher rates enforced by the Union Pacific on routings over the Rio Grande have nevertheless routed their shipments over the Rio Grande.

Reference is here made to these errors of statement and of relevancy only to show that because of their very nature they are not matters which, on a summary motion, can be fully discussed, considered and disposed of.

THE PRINCIPAL POINTS RELIED UPON BY APPELLANTS

The Motion To Reverse is based principally upon three points:

1. That the decision of the Commission is not an order;

2. That even if the decision of the Commission is held to be an order, the Rio Grande has no standing to maintain the suit, and

3. That the court erred in deciding that the Commission erred, as a matter of law, in finding that the through routes via the Rio Grande, the Union Pacific, et al., via the Ogden Gateway are not through routes within the contemplation of Section 15 (3) and (4) of the Interstate Commerce Act and that this error, which resulted in self-imposed restrictions upon the authority of the Commission to establish reasonable

and non-discriminatory joint rates, prejudiced the entire proceeding. (*Denver & Rio Grande Western R. Co.* v. *United States*, 131 F. Supp. 372, 378-379).

Even when the appellants dealt with each of these points they were unable to resist the temptation to ramble off into the merits of the case which are unrelated to the points.

As to the first point: For the convenience of the court there is attached hereto as Appendix 1 to this brief a copy of the order of the Commission of January 12, 1953. It will be observed that the first paragraph of that order specifically states that the report containing the findings of fact and conclusions of the Commission "is hereby referred to and made a part hereof." There is also attached hereto as Appendix 2 the conclusions of the Commission which appear in its report, 287 I.C.C. 611, at page 659. We shall deal with the three points described in the order in which they are stated.

In support of the contention that the decision of the Commission involved in these appeals is not an order, the appellants rely very heavily on *United States* v. *Atlanta, B. & C. R. Co.*, 282 U.S. 522. The decision in that case is distinguishable from the facts of the instant case. In that case there is involved a complicated accounting situation growing out of the receivership and reorganization of the Atlanta, Birmingham and Atlantic Railway Company, 117 I.C.C. 181, and in the supplemental report of the Commission in the same case, 117 I.C.C. 439, 443. The order of the Commission in the case cited which authorized the new company to issue preferred and common stock imposed certain conditions with respect to the

accounting classification of "investment in road and equipment." When the new company set up its books it did not comply with those conditions. As a result of a further hearing and reconsideration of the questions involved, the Commission issued its report in *Atlanta, B. & A. Ry. Co. Reorganization,* 158 I.C.C. 6, 13, 14, in which it stated the value of the property of the railroad for rate making purposes and prescribed accounting rules and regulations but entered no order to which its report and finding was a part. The concluding paragraph of the last decision reads as follows:

> "Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

It will be seen that in that case the Commission merely stated that the company will be expected to adjust its accounts in accordance with its finding within 60 days from the service of its report. The findings there are not only not in the form of an order but did not purport to be an order.

That decision should be compared with the recent decision of the court in *Henderson* v. *United States,* 339 U.S. 816, which reversed with directions to remand the decision of the court below that sustained the decision of the Commission in *Henderson* v. *Southern Ry. Co.,* 269 I.C.C. 73, 78, wherein the Commission found that under the revised rules of the Southern Railway, Henderson was not subjected to unreasonable

prejudice and disadvantage. The Commission did not enter an order. In that case the United States on brief and oral argument supported the appellant on the ground that it was clear that he had standing to institute the suit and to bring the proceedings since he was an aggrieved party, free to travel again on the Southern Railway. This court sustained that view and overruled the Commission by finding that Henderson was subject to undue prejudice in violation of Section 3 of the Interstate Commerce Act and remanded the case with directions. It will thus be seen that in the *Henderson* case this court considered a decision of the Commission on which no order was entered, despite the old decision of the court in the *Atlanta, B. & C. R. Co.* case, 282 U.S. 522.

The fact that the order of the Commission in the instant case does not use the word "dismissed" is of no significance since, as was cogently stated in the *Rochester Telephone* case, 307 U.S. 125, at page 142:

> "The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same."

The discussion of this general question by Mr. Justice Frankfurter at page 142 and other pages of the *Rochester Telephone* case is a complete answer to the contentions of the appellants that that part of the decision of the Commission which denied the relief sought by the Rio Grande and which is involved in the appeals here under consideration is not an order and therefore is not subject to review by this or any other court.

The appellants have also relied to a large extent upon *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S.

235, to support its position. In *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, the court upheld the right of the Government as a plaintiff and shipper to maintain a suit against itself. At page 436 of its opinion in that case, after referring to the doctrine of the *Standard Oil* case, the court made the statement that—

> "This doctrine was wholly abandoned in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125."

We will now discuss *Manufacturers' Ry. Co.* v. *United States*, 246 U.S. 457, another decision relied on by the appellants. The facts of that case are so completely different from the facts in the instant case as to make it wholly inapplicable. In *Manufacturers Ry. Co.* v. *United States*, a failure by the Commission "to fix divisions" was held not to be subject to judicial review because it involved a failure or refusal of the Commission to exercise its administrative authority. In the instant case, which was in all respects an adversary proceeding between active litigants, while the question of the existance of *through routes* was initially a mixed question of law and fact to be decided by the Commission, yet after the taking of evidence and extended hearings and arguments with a record before it in which the evidence on this issue was undisputed the issue became a question of law. The Commission's failure to resolve it was not merely a failure to make an administrative finding. It was a failure to correctly apply the law to the undisputed facts before it. The usual rule with respect to a mere administrative finding not being subject to judicial review became inapplicable and cannot and should not prevent the court examining into the question and deciding as a matter of law upon the whole record

whether *through routes* were in existence. This is exactly what the Denver court did.

It should be pointed out that both the *Atlanta* case and the *Manufacturers* case above referred to and so heavily relied upon by the movants were decided prior to the *Rochester Telephone* case, the *Youngstown* case, the *Mitchell* case and prior to the Administrative Procedure Act.

We shall now discuss the second point made by appellants, which is that even if the decision of the Commission is an order subject to review, the Rio Grande has no standing to bring or to maintain the suit in the court below. In dealing with this question the appellants indulge in a discussion of the right of one railroad to capture or recapture traffic which it originates or which moves by other railroads. Obviously such facts are wholly irrelevant to the question whether the Rio Grande has a right to maintain the suit. The court below did not err in finding that the Rio Grande has a sufficient interest to maintain the suit, the decision in which is here the subject of appeal.

Section 13(1) of the Interstate Commerce Act affirmatively provides that any person, firm, corporation, company, or association, *or any common carrier*, may file a complaint with the Commission against anything done or omitted to be done by any other common carrier subject to the provisions of this act, in contravention of such provisions, and that if the defendants in such a complaint do not satisfy the complaint, and there be any reasonable ground for investigating the complaint, it shall be the duty of the Commission to investigate it. Thus the Interstate Commerce Act conferred upon the Rio Grande, a

common carrier, the statutory right to complain against the Union Pacific and the other defendants of things which they did or failed to do in contravention of the provisions of the Interstate Commerce Act.

Paragraph (4) of Section 1 of the Interstate Commerce Act imposes upon common carrier railroads the duty to furnish transportation upon reasonable request and to "establish reasonable through routes with other such carriers, (and water carriers) and just and reasonable rates * * * applicable thereto; * * *." That section also imposes the duty upon railroads establishing through routes "to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates * * * to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Paragraph (1) of Section 3 makes it unlawful for any common carrier subject to the Act

> "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be con-

> strued to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Paragraph (4) of Section 3 provides:

> "All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, * * *."

The cited provisions of the Interstate Commerce Act impose duties upon common carriers by railroad subject to that act which are independent of the authority of the Commission to enforce obedience to those duties, which authority is principally in Sections 12 and 15 of the Act. These provisions coupled with Section 13(1) confer the right to complain where a railroad such as the Rio Grande is unable to persuade connecting lines to comply with them. It, therefore, follows that where, as here, it is claimed by the Rio Grande that the Union Pacific and the other railroad defendants before the Commission violate the Interstate Commerce Act by their failure and refusal to participate with the Rio Grande in the maintenance of reasonable and non-discriminatory joint rates, rules, and regulations with respect to the operation of through routes and have failed and refused to accord reasonable, proper and equal treatment in the matter of rates and the interchange of traffic, such railroad defendants have violated the provisions of the Interstate Commerce Act. They have also violated the

statutory rights of the Rio Grande conferred in the provisions of that act.

Section 1398 of Title 28 U.S. Code provides—

> "Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

In addition to the decision in the *Rochester Telephone* case there are numerous other decisions of this court which support the right of the Rio Grande to maintain the suit, the subject of this appeal. In *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476, 479, in which contentions similar to those made here by the appellants were rejected by the court, it held that

> "The appellants were entitled to bring and maintain this suit to set aside the order. They were parties to the proceeding before the Commission, had a pecuniary interest in the rates and were affected by the order. The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were unreasonable or discriminated against them."

The court below had jurisdiction to review the order of the Commission under 28 U.S.C. § 1398 of the Judicial Code. The complaint of the Rio Grande in that court alleged that it not only has a pecuniary interest in the issues raised; but that the order, unless remanded to the Commission for correction of errors alleged, will cause the Rio Grande irreparable injury

in that the alleged unjust, unreasonable and unjustly discriminatory rates, routes and practices of the defendant railroads that will be perpetuated by the order, violate the statutory right of the Rio Grande to participate on equal terms in the revenues from through traffic at joint competitive through rates and through routes under the provisions of the Interstate Commerce Act. The fact, that the part of the order of the Commission here involved is negative is not a bar to the right of the Rio Grande to maintain the suit.

In *Mitchell* v. *United States*, 313 U.S. 80, this Court considered the decision and order of the Commission in *Mitchell* v. *C. R. I. & P. Ry. Co.*, 229 I.C.C. 703, in which the Commission held that the treatment accorded Mitchell by the railroads which he claimed was unjustly discriminatory was neither that nor unduly prejudicial under the provisions of the Interstate Commerce Act. This Court did not hesitate to substitute its judgment for the judgment of the Commission in determining that the treatment accorded Mitchell was unjustly discriminatory and unduly prejudicial under the provisions of the Interstate Commerce Act. It based its reversal on that ground and not on the constitutional ground mentioned in the decision since, at page 93 of the opinion of the Court, it said that

> "He (Mitchell) presents the question whether the Act does forbid the conduct of which he complained."

In *Henderson* v. *United States*, 339 U.S. 816, this Court reversed and set aside a decision of the Interstate Commerce Commission in *Henderson* v. *Southern*

Ry. Co., 269 I.C.C. 73, in which no order was entered but which held that the practice of the Southern Railway in the treatment of negroes in its dining cars was not unduly prejudicial or preferential. Like the *Mitchell* case, this Court did not hesitate to substitute its judgment as to what constituted undue prejudice for the judgment of the Commission. Each of these cases were remanded with directions.

In *The Chicago Junction Case*, 264 U.S. 258, which dealt with an order of the Commission that authorized, but did not require, the New York Central to purchase control of the Chicago Junction Railway, the Court sustained the right of the Pennsylvania Railroad, the Baltimore and Ohio, and other competitors of the New York Central to maintain the suit to set aside the order of the Commission. It was there claimed by the defendants that the plaintiffs, as competitors, did not have a sufficient legal interest to permit them to bring or to maintain this suit. In that case the Court was moved in part by the consideration that the plaintiff railroads would lose large sums of money by virtue of the control of the Chicago Junction by the New York Central; that they were parties to the proceeding before the Commission and thereby acquired the right to sue, and also had such a right under Section 212 of the Judicial Code (28 U.S.C. Section 41(27) note). The Court stated, 264 U.S., at page 267, apropos of the large loss sustained by the railroad plaintiffs:

> "This loss is not the incident of more effective competition. Compare *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148, 44 Sup. Ct. 72, 68 L. Ed. . It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Com-

merce Act, as fully entitled as any shipper. *Pennsylvania Co.* v. *United States*, 236 U.S. 351, 35 Sup. Ct. 370, 59 L. Ed. 616."

In *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, the plaintiff sought to enjoin the consummation of loans made by the Federal Emergency Administrator to four municipal corporations in Alabama. In its right to bring the suit the plaintiff relied strongly on the decision of this court in *The Chicago Junction Case*. However, the Court held that the Alabama Power Company did not have the right to bring the suit or to maintain it and, at page 483 of its opinion, 302 U.S., it distinguished *The Chicago Junction Case* from the *Alabama Power* case by stating that the suit in *The Chicago Junction Case* was brought by certain railroad companies to set aside an order of the Commission authorizing a competing company to acquire a terminal and that in *The Chicago Junction Case* "* * * this court held that the right to sue arose in virtue of a special interest recognized by certain provisions contained in Transportation Act 1920, 41 Stat. 456, and under section 212 of the Judicial Code, 28 U.S.C.A. Section 41(27) note, which gave any party to a proceeding before the Commission the right to become a party to any suit wherein the validity of an order made in the proceeding is involved."

The right of the Rio Grande to bring and to maintain the suit in the court below under the Interstate Commerce Act is also sustained by *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60; *American Trucking Ass'n.* v. *U.S.*, 326 U.S. 77; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 435; *Barrett Line, Inc.* v. *United States*, 326 U.S. 179; *Skinner & Eddy Corporation* v. *United States*, 249

U.S. 557; *United States* v. *New River Co.*, 265 U.S. 533; *Alton R. Co.* v. *United States*, 287 U.S. 229, and the revealing and comprehensive opinion by Judge Parker in *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462.

In addition to the right of the Rio Grande to bring and to maintain the suit under the statutes cited, that right is buttressed by Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 1009. That act gives

> "Any person suffering a legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof."

In *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346, 348, where the plaintiff sued to set aside the action of the Federal Maritime Board which granted a subsidy to a competitor, the court pointed out that while the plaintiff had not suffered any legal wrong he is within the terms of the second clause of Section 10(a) as a person "adversely affected or aggrieved" and that if these words mean affected or aggrieved in a legal sense they would add nothing to the phrase "Any person suffering a legal wrong." In these circumstances the court held that the plaintiff, being a person that was adversely affected or aggrieved, had the right to maintain the suit. In doing so the court relied upon *Federal Communications Com'n.* v. *Sanders Bros. R. S.*, 309 U.S. 470. The conclusion of the court and the position taken by the Rio Grande is also supported by *American P. & L. Co.* v. *Securities & Exchange*

Com'n., 325 U.S. 385; *State of Oklahoma v. United States Civil Serv. Com'n.*, 330 U.S. 127, and *Shaughnessy v. Pedreiro*, 75 S. Ct. 591.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009, also supports the right of the Rio Grande to bring and maintain this suit since it gives Federal courts jurisdiction to compel agency action "unlawfully withheld or unreasonably delayed" or to hold unlawful and set aside agency action, findings and conclusions found to be "not in accordance with law" or "short of statutory right." In addition to the arguments already made, the Rio Grade contends that by refusing to grant the relief prayed for in the instant suit the Commission unlawfully withheld action to which the Rio Grande is entitled.

The third point emphasized by the appellants is that the court below erred in deciding that the Commission erred as a matter of law in finding that the through routes via the Rio Grande, the Union Pacific, and other railroads through Ogden are not through routes within the contemplation of Section 15(3) and (4) of the Interstate Commerce Act. A reading of the opinion of the court below will quickly reveal that it gave this question very serious consideration. That opinion supports the view of the court below that the Commission misconstrued the decision of this Court in *Thompson v. United States*, 343 U.S. 549.

The *Thompson* case involved an order of the Commission entered in *Omaha Grain Exchange v. Missouri Pacific*, 278 I.C.C. 519. In that case the complainant did not assert that through routes existed or that joint rates and through routes should be established. It assumed that through routes existed for the movement

of grain from Lenora, Kans., and other points on the Missouri Pacific west of Concordia, Kans., to Omaha, Nebr., in connection with the Burlington at Concordia because (a) physical track connections for the interchange of traffic existed at Concordia between the Missouri Pacific and the Burlington, and (b) joint rates existed on grain from Lenora, Kans., and the other points involved via Concordia, Kans., and the Burlington to local or non-competitive points on the Burlington which are intermediate to Omaha.

The Commission found that the rates assailed were unreasonable to the extent that they exceed rates on grain traffic from the same origin points to Kansas City. That finding was made on the assumption that through routes on grain traffic from Lenora, Kans., and other points on the Missouri Pacific west of Concordia existed in connection with the Burlington through Concordia to Omaha. There was no evidence in that case that through transportation service on grain had ever been offered or performed from Lenora to Omaha via the Burlington.

The opinion of the Court in the *Thompson* case recites that the United States, having joined in the defense of the Commission's order in the District Court and on a motion to affirm in this Court, filed a memorandum conceding that the Commission erred in finding that through routes over the Burlington line already exist.

In the *Thompson* case, 343 U.S. 549, at page 557, the Court referred to the decision of the Commission in *Through Routes and Through Rates*, 12 I.C.C. 163, 166, and of this court in *St. Louis Southwestern Ry. Co. v. United States*, 245 U.S. 136, 139, in each of which

decisions a through route was defined as "an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregate of separate rates fixed independently by the several carriers forming the through route; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation."

This Court also stated apropos of this question at page 557 of its opinion in the *Thompson* case:

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

As we have already stated, there was no evidence in the *Thompson* case that through transportation service on grain had ever been offered or performed from Lenora, Kans., and the other points to Omaha via the Burlington.

What is a "holding out" as announced in the *Thompson* case, *supra?* In any form of business it does not require active, affirmative solicitation of business. The merchant who has his shop on any street, with his door open to the public, holds himself out to accept business and thus solicits business. There is a "holding out" whether he receives a large or a small amount of

business and whether his prices are higher or lower than a shop up the street. There is only a lack of holding out when he refuses to accept business. Under the undisputed evidence in the case and under its own admissions, the Union Pacific never refused to accept through shipments and issue through bills of lading over the Rio Grande where a shipper to or from the "closed door territory" was willing to pay the higher combination rate. As shown by the evidence and as set forth in the decision in the *Denver* case, and in spite of the higher rates, substantial shipments via the Rio Grande on through bills of lading issued by the Union Pacific were made during the years immediately preceding the institution of proceedings before the Commission. Thus the evidence showed that the contention that *through routes* were commercially closed was pure theory.

Through routes and joint competitive rates admittedly exist on shipments to and from Southern California and Nevada points on the Union Pacific to and from eastern points via the Rio Grande at Salt Lake City and Ogden, and on shipments to and from Seattle via the Union Pacific through Portland, thence Southern Pacific via Ogden and Rio Grande on the Union Pacific. Since the Union Pacific has its own line from Ogden and Salt Lake City to Denver and thence to Omaha and Kansas City, it is obvious that it does not either in the east, in California, or in Seattle solicit shippers to route traffic via these routes in connection with the Rio Grande at Ogden even though joint rates and through routes exist. It is, therefore, clear that in the *Thompson* case this court could not have meant that the holding out requires affirmative solicitation by particular railroads over

particular through routes as a test for determining whether through routes exist. The significance of the decision in the *Thompson* case is that a through route will be found to exist both in fact and in law where there is a holding out in the sense of a willingness to accept and transport the traffic or where as in the instant case a substantial volume of traffic has moved via the Rio Grande on through bills of lading issued by the Union Pacific or eastern railroads for movement via the Rio Grande through Ogden and the Union Pacific with the acquiescence of the Union Pacific and the other railroad defendants before the Commission.

The Union Pacific claims that when the joint rates via the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company were canceled between August 1906 and December 1912, the through routes were commercially closed. But there is nothing in the Interstate Commerce Act that says that the cancellation of a joint rate, without more, cancels a through route. There are many expressions of this court, the Commission, and of lower courts to the contrary. The decision of this court in the *Virginian Railway* case, 272 U.S. 658, 667, was confirmed in that respect by this court in *Thompson* v. *United States*, 343 U.S. 549, and in *United States* v. *Great Northern*, 343 U.S. 562, where, at page 572, the court said:

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this Court expressly has approved Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates. As a result, the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes."

In dealing with this question the Commission in its report in the instant case, 287 I.C.C. 611, at page 616, stated that the testimony of numerous shippers indicates that the routes via the Ogden Gateway and the Rio Grande "are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be open to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess."

In the light of the facts before the Commission in the instant case which show that in a ten year period there was a movement of more than over 24,000 carloads of traffic between various eastern points via the Rio Grande, the Ogden Gateway and the Union Pacific and its connections, it is impossible to reconcile the finding of the Commission that no through routes exist with the decision of this Court in *Virginian Ry. Co.* v. *United States,* 272 U.S. 658; *Great Northern* v. *United States,* 81 F. Supp. 921, affirmed in 336 U.S. 933; *United States* v. *Great Northern,* 343 U.S. 562, or with the *Thompson* case.

In the *Virginian Railway* case this Court rejected as "without legal significance" the contention of the railroads that routes which were commercially closed as the result of excessive and discriminatory combination rates are not through routes within the meaning of the Interstate Commerce Act. In reaching that conclusion Justice Brandeis first pointed out (pp. 660-661) that of 99 coal mines located on the Virginian Railway, 54 were denied the opportunity of reaching western markets, even though accessibility to such

markets was physically possible through a junction of the Virginian and the Chesapeake & Ohio. In that connection Justice Brandeis said:

> "But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these fifty-four mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. The complainants contended before the Commission that the existing rate schedule to the West subjects them to unjust discrimination, and, also, that the combination rates are unreasonable."

At page 667 of the *Virginian Railway* case the Court stated that where through routes exist Section 15(3) of the Act does not require that "The Commission must make a special finding of public interest before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law." To the same effect is the decision of this court in *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U.S. 768, 776.

Appendix 3, attached hereto, contains a sketchy outline of the evidence of record before the Commission and before the lower court which shows the large and continuous movement of traffic via the route of the Rio Grande in connection with eastern railroads and the Union Pacific at Ogden, some of which moved on bills of lading issued by the Union Pacific or by its connections, in which it concurred.

The evidence described in Appendix 3 is in marked contrast with the evidence and the issues in the

Thompson case, 343 U.S. 549, at which page the court said:

> "But there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line or that the carriers have ever offered through service over that route * * *."

In addition to the movement of traffic in the instant case via the Rio Grande and the lack of any traffic in the *Thompson* case, there are other factors in the instant case which distinguish it from the *Thompson* case. We have already referred to the fact that joint competitive rates and through routes were established via the Rio Grande via Ogden and Salt Lake City on the traffic and between the territories involved in 1897; that the through routes thereby established are still in effect since they have not been canceled by the Union Pacific or other railroads; that in the period of August 1906 and December 1915 the Union Pacific caused the joint competitive rates for application over the Rio Grande via Ogden to be canceled, but that no action was taken then or later by the Union Pacific or other railroads to cancel the through routes.

It is too well settled to require argument that under the Interstate Commerce Act the cancellation of joint rates does not, without more, cancel through routes. This was recognized by this Court in its decision in *United States* v. *Great Northern*, 343 U.S. 562, and in other cases.

In *Routing via Quanah, A. & P. Ry. Co.*, 220 I.C.C. 137, 139, the Commission not only held that the cancellation of a joint rate did not cancel the through route; but also that when a joint rate is canceled it is the duty of the railroad to leave in effect over the

through route combination rates which in the aggregate will be just, reasonable and otherwise in accordance with the standards of the Interstate Commerce Act. That decision was sustained in *Thompson* v. *United States*, 20 Fed. Supp. 827. See also in this connection *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 226 I.C.C. 201, 208; *Routing Grain and Grain Products via Chicago, R. I. & P.*, 198 I.C.C. 117; *Grain and Grain Products*, 161 I.C.C. 709; and *Routing on Iron and Steel Articles*, 168 I.C.C. 175.

Section 6(1) of the Interstate Commerce Act affirmatively recognizes the existence of through routes in the absence of joint rates. The pertinent part of Section 6(1), 49 U.S.C., § 6, provides:

> "(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water *when a through route and joint rate* have been established. If *no joint* rate over the *through route* has been established, the several carriers *in such through route* shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation." (Emphasis supplied.)

As we have already shown, the principal traffic witness of the Union Pacific unequivocally stated that the route via the Ogden Gateway and the Rio Grande is open and available to shippers who are willing to pay the higher through rates. We have also shown

that during the oral argument of the case before the Commission counsel for the Union Pacific, in answer to a question from the chairman as to whether he thought the through routes were closed in the period 1906-1915 when the joint rates were cancelled, answered:

> "Mr. Collins: No. I don't think so, if they want to pay more, if they want to route via the Rio Grande and pay the price."

At pages 16 and 17 of their Motion To Reverse appellants say that they have not solicited or otherwise tried to influence the routing of traffic via the Rio Grande through Ogden and that this is indicated by their steadfast refusal over a 50-year period to relinquish their long haul. The fact that the Union Pacific has not affirmatively solicited traffic over the routes of the Rio Grande between the "closed door" territory in Idaho, Montana, Oregon and Washington at the higher rates is of no significance. The Rio Grande as already shown participates in joint competitive rates with the Union Pacific on traffic to and from points on its line into California. It is conceded that through routes exist on the traffic moving between points on the California line of the Union Pacific and all eastern points. One would have to be *naive* indeed to assume that because the Union Pacific does participate in joint rates with the Rio Grande on that traffic it would act against its own interest in affirmatively soliciting shippers to use the Rio Grande route between Ogden and Denver rather than the Union Pacific route to Denver.

The contention that the Union Pacific and the appellants, as well as other railroads who were

defendants before the Commission, have steadfastly refused over a long period to relinquish their long hauls is refuted by the evidence of record which has been filed with the Clerk of this Court.

The appellants and other railroad defendants in the complaint before the Commission have not steadfastly refused to relinquish their long hauls in dealing with each other. They have however, refused to relinquish their long hauls in connection with the handling of the traffic involved insofar as the Rio Grande is concerned. On the other hand, the Union Pacific and the other appellants participate with each other in joint rates via routes in which each, or some of them, relinquish their long hauls. For example, a shipper at Seattle, Wash., may deliver a shipment consigned to Chicago, Kansas City or St. Louis, to the Union Pacific at that point and route the shipment at competitive rates via the Southern Pacific at Portland and thence via the Southern Pacific through southern California, Arizona, New Mexico, and other railroad connections; or the shipper may route such a shipment from Seattle via the Union Pacific to Portland, thence Southern Pacific through Ogden and thence either Union Pacific or Rio Grande from Ogden to eastern points. Under such routing the Union Pacific receives a haul of 184 miles from Seattle to Portland. It could haul the shipment from Seattle to Omaha, a distance of 1,954 miles.

The distance via the route through southern California, which is available to the shipper at Seattle, is 3,541 miles. If the joint rates sought by the Rio Grande were established through Ogden, the Union Pacific would receive a haul of 1,027 miles from Seattle to Ogden, which may be compared with the distance

of 184 miles which it voluntarily takes from Seattle to Portland.

On a shipment moving from Pendleton, Ore., to St. Louis, Mo., the long haul of the Union Pacific would be from Pendleton to Kansas City, a distance of 1,674 miles. The Union Pacific participates with the appellants and other railroads in joint competitive rates via Spokane, Wash., the Spokane International, Canadian Pacific and other railroads through Minneapolis, and thence via the Rock Island or the Wabash to St. Louis. The distance via this route is 2,317 miles, and the haul of the Union Pacific is 227 miles. If the joint rates sought via Ogden and the Rio Grande were established the distance from Pendleton to St. Louis would be 2,149 miles, and the Union Pacific would get a haul of 633 miles. Exhibit 3, introduced before the Commission by Witness Earley of the Rio Grande, contains numerous other examples in which the appellants participate with each other in joint competitive rates in which they take less than their respective long hauls. They refuse to accord like treatment to the Rio Grande.

In addition to the type of examples just referred to, the Union Pacific participates with appellants and other railroads in which some of the railroads take less than their respective long hauls on lumber which moves from points on the Union Pacific in Idaho, Washington and Oregon to points east of Denver and Pueblo, the Union Pacific relinquishes the traffic to its connections at Cheyenne and Denver. It refuses to accord like treatment to the Rio Grande on the eastbound movement of fruits, vegetables, grain and certain other commodities. The Union Pacific participates with other railroads in joint rates and

routes that apply via Denver to destinations in what is described as the Missouri River territory and Southwestern points. It is not deemed necessary or advisable to burden this brief with the numerous other examples.

The appellants attempt to justify these obvious discriminations because the rate situations referred to have the sanction of time and involve reciprocal arrangements in respect to the interchange of traffic the appellants consider satisfactory and in the interest of each. In *Pennsylvania Co.* v. *United States*, 236 U.S. 351, where the validity of an order of the Commission was assailed, the defendant there argued that the discriminatory treatment of the complaining railroad was not an unjust discrimination because of the lack of similar reciprocal interchange and traffic arrangements between defendants and the complaining railroad. In dealing with that contention, this Court said:

> "We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road."

The decision of the Supreme Court in *Chicago, I. and L. Ry. Co.* v. *United States*, 270 U.S. 287, is to the same effect and deals with a situation substantially similar to the attempted defenses of the appellants in the instant case.

Many years ago the Commission stated that the policy of the Interstate Commerce Act is that the railroads of the country should unite themselves so that they will constitute one national system; that they must establish through routes, keep these routes open

and in operation, and furnish the necessary facilities for transportation. *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.*, 22 I.C.C. 39, 46. The policy of the Act, as amended since the decision in the *Missouri & Illinois Coal* case, was pointedly stated by the Commission in the recent decision of *Borough of Edgewater, N. J.* v. *Railroads*, 280 I.C.C. 121, at page 134. This decision was sustained in *Baltimore and Ohio* v. *United States*, 100 F. Supp. 1002. In that case, at page 134, the Commission said that it is the purpose and policy of Congress that rates be adjusted and other steps be taken to ensure adequate and efficient transportation for the country, and that the policy was not intended that it should accept as the guide, transportation service which is just barely adequate, or adequate only if needed or desirable improvements in service are lost sight of.

CONCLUSION

When all matters raised by the "Motion to Reverse" are resolved to their least common denominator, the Rio Grande had an undisputed statutory right to complain before the Commission; it had a right to predicate its compiaint primarily on the existance of *through routes;* it had a right to have the Commission decide that basic question; it suffered a legal wrong, in view of the undisputed evidence and admissions of the Union Pacific in the Commission's failure to decide that basic issue; this entitled the Rio Grande to resort to a statutory three-judge court. Whether the action of the Commission is to be treated as a complete failure to decide the basic issue, or whether it is said that because of the concurrence of Commissioner Arpaia in the general result, *even though he also found that through routes were in existence,* there was a

holding by the Commission of the non-existence of through routes—in either event, the Rio Grande was entitled to have the matter reviewed by a three-judge statutory court because the issue was an issue of law and not an administrative question. If that review was based as it was upon the proposition that the Commission incorrectly interpreted and misapplied the law, and if under the undisputed evidence and the admissions in the case the three-judge court at Denver so found, then it was proper for that court to make a conclusion of law accordingly and to remand the case to the Commission for further proceedings in conformity with that conclusion.

The "Motion to Reverse" should be denied—probable jurisdiction should be noted and the case allowed to stand for argument.

Respectfully submitted,

FRANK E. HOLMAN
Hoge Building
Seattle, Washington

DENNIS MCCARTHY
1311 Walker Bank Building
Salt Lake City 1, Utah

ROBERT E. QUIRK
Investment Building
Washington, D. C.

Counsel for Appellee,
The Denver and Rio Grande
Western Railroad Company.

September 13, 1955

Proof of Service

I, ROBERT E. QUIRK, one of counsel of record for appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of September, 1955, I served, on behalf of all appellants herein, copies of the foregoing Motion on the several parties thereto and parties to the appeal in No. 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope, postage prepaid to: (and air mail to D. E. Kelley)

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

4. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

5. On Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Idaho Farm Bureau; Public Service Commission of Utah; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

6. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

7. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

8. On the Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis and Omaha Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company, plaintiffs; and employee organization of Union Pacific Railroad Company, intervening plaintiffs; by mailing a copy in a duly addressed envelope with air-mail postage prepaid to their respective attorneys of record, as follows:

Elmer B. Collins, Esq.
Assistant Western General Counsel
Union Pacific Railroad
1416 Dodge Street
Omaha 2, Nebraska

F. O. Steadry, Esq.
Attorney for Chicago and North Western Ry. Co.
400 West Madison Street
Chicago, Illinois

Eugene S. Davis, Esq.
Attorney for Wabash Railroad Company
Railway Exchange Building
St. Louis 1, Missouri

Roland J. Lehman, Esq.
Attorney for The Atchison, Topeka and Santa Fe Railway Company
80 E. Jackson Boulevard
Chicago 4, Illinois

M. L. Countryman, Jr., Esq.
Attorney for Northern Pacific Railway Company
5th & Jackson Streets
St. Paul 1, Minnesota

L. E. Torinus, Jr. Esq.
Attorney for Great Northern Railway Company
175 East 4th Street
St. Paul 1, Minn.

M. P. Caveny, Esq.
Chairman, Union Pacific General Chairman's Asso.
Omaha, Nebraska

9. On the State of Nebraska and the Nebraska State Railroad Commission; Washington Public Service Commission; Public Utilities Commission of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization of Wyoming; Public Service Commission of Wyoming; Public Service Commission of Utah; National Livestock Producers Association, by mailing a copy in a duly addressed envelope with air-mail postage prepaid to their respective attorneys of record, as follows:

Clarence S. Beck, Esq.
Attorney General of Nebraska
Lincoln, Nebraska

Bert L. Overcash, Esq.
Assistant Attorney General of Nebraska
Lincoln, Nebraska

Don Eastvold, Esq.
Attorney General of Washington
Olympia, Washington

John H. Carkin, Esq.
Counsel, Public Utilities Commission
State of Oregon
Salem, Oregon

John H. Riskin, Esq.
Secretary,
Board of Railroad Commissioners of Montana
Helena, Montana

Howard B. Black, Esq.
Attorney General of Wyoming
Cheyenne, Wyoming

10. On the National Live Stock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers Association and Horse Growers Association, Intervenors as Plaintiffs.

Lee J. Quasey, Esquire
139 N. Clark Street
Chicago 2, Illinois

ROBERT E. QUIRK
Attorney for Appellee
The Denver and Rio Grande
Western Railroad Company.

APPENDIX 1

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the

transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainants according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report; and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before

April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD,
Acting Secretary.

(SEAL)

APPENDIX 2

Conclusions

"1: That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the lower peninsula of Michigan and in Oklahoma and Texas.

"2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

"4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

An appropriate order will be entered.

APPENDIX 3

Movement of Traffic Via the Rio Grande During the Periods Shown

That during the period from November 1942 to August 17, 1945, the Rio Grande handled approximately 19,000 carloads of traffic from points on its line and from eastern points destined to points in Oregon and Washington which had been routed via the Rio Grande and the Western Pacific or the Rio Grande and the Southern Pacific, but were diverted to the Union Pacific at Ogden and Salt Lake City. (Hogue—66, 67.)

During January and February 1949 when blizzards and snowstorms blocked the Union Pacific main line between Cheyenne and Ogden, 4,208 carloads of freight eastbound and westbound were diverted to the Rio Grande for movement via its line between Denver and Utah junction points

and thence via the Union Pacific. Of that number about 1,400 carloads originated or were destined to Union Pacific points in the closed door territory at which competitive joint rates were not applicable.

During that same blizzard period, the Rio Grande handled 210 carloads of express and 276 carloads of mail between Denver and Salt Lake City for the Union Pacific. In addition, it handled 44 Union Pacific passenger trains, consisting of from 10 to 16 cars each, between Denver and Salt Lake City. (69)

The carload traffic described was diverted under emergency orders of the Commission, none of which purported to establish or did establish temporary through routes as authorized in Section 15 (4) of the Act. The traffic was diverted by the Commission to the Rio Grande under Section 1(15) on the obvious assumption that through routes and the facilities for operating such routes existed.

In addition to the traffic that was diverted to the route of the Rio Grande on emergency orders, a large volume of traffic was initially routed by the shippers via the Rio Grande on bills of lading via Ogden and the Union Pacific between points in the closed door territory and eastern points. For example, there were several special trains, consisting of troops and military supplies in freight cars, handled on freight billing and which consisted of from 30 to 50 cars per train.

One train, consisting of 24 cars of military supplies and six passenger cars, moved from Ft. Sill, Okla., in December 1941 to Ft. Lewis, Wash., via eastern connections, the Rio Grande through Ogden and the Union Pacific.

Another special train, consisting of 50 cars of military supplies and some troops, moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February 1942 via different eastern railroads in connection with the Rio Grande through Ogden and the Union Pacific.

Another special train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February 1942 via different eastern

railroads, the Rio Grande through Ogden and the Union Pacific.

Still another train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., in February 1942 to Ft. Lewis, Wash., via the Rio Grande through Ogden and the Union Pacific.

In March, 1942 the Rio Grande handled 524 carloads of war material from eastern points originally consigned to Ogden and Clearfield, Utah, for the purpose of being stored. These cars were diverted on instructions of shippers to points in the northwest via the route of the Union Pacific and Ogden without ever having been unloaded at the original destinations named.

Thirty-nine carloads of freight moved eastbound in 1948 from points in the closed door territory on bills of lading issued by the Union Pacific consigned principally to Colorado common points and were routed via Ogden and the Rio Grande, some of which were probably diverted to points east. They contained canned goods, machinery, contractors equipment, paper bags, lumber, wallboard, flour, sheep, roofing, acid, newsprint and canned salmon.

The Rio Grande transported an equal number of carloads of a variety of commodities, such as tractors, canned goods, agricultural implements, furniture, soap, castings, feed, rubber, iron and steel, and other commodities from numerous eastern points, such as Springfield and Chicago, Ill., Menominee, Mich., Lewisburg, Pa., Jeffersonville, Ind., Forest City, Ark., Sedalia, Mo., Indianapolis, Ind., Wichita, Kans., and other points on bills of lading issued by eastern railroads which routed the traffic via the Rio Grande through Ogden and the Union Pacific to points in the closed door territory. The charges were assessed on the basis of the aggregate of the combination of intermediate rates. (67-70, Ex. 1)

At page 74 of the transcript of the hearing at Salt Lake City in December 1949, Vice President Hogue, of the Rio Grande, testified that he used the year 1948 because it was the last calendar year prior to the hearing and "that the same problems prevailed to about the same extent in prior years, and have continued thus far in 1949."